No. 16-476

IN THE
Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The United States twice concedes that PASPA "would violate the Tenth Amendment" if it required New Jersey "to enact or maintain prohibitions on sports gambling." U.S. Br. 8, 19. And the Leagues acknowledge that as a result of the lower courts' injunction, the state-law prohibitions that New Jersey's Legislature has chosen to repeal must "now remain in force." Leagues Br. 44. That should be the end of the case, because the Commerce Clause does not "confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992), *quoted in* U.S. Br. 11. But that is precisely what PASPA does. It dictates the contents of New Jersey's laws by conscripting New Jersey's Executive—as if he were a "puppet[] of a ventriloquist Congress," *Printz* v. *United States*, 521 U.S. 898, 928 (1997) (quotations omitted)—to keep "in force" statutory prohibitions on sports wagering that the State's Legislature has repealed.

The Leagues and the United States admit they are advancing an "unusual" form of preemption, Leagues Br. 35 n.7, "differ[ent] from the typical formulation," U.S. Br. 16 n.4, where Congress can proscribe state lawmaking in an area of commerce and cause state-law enactments to "revert . . . to [their] pre-amendment status," *id.* at 11, all without adopting any federal regulatory scheme that displaces contrary state law. "[U]nusual," indeed. It is, in fact, so "unusual" that when the Leagues first sued New Jersey, the U.S. Attorney declared in court that no one was "arguing the actual [d]octrine of [p]reemption." App. 3a. And although the United States now claims

that federal law "routinely" bars States from repealing their own state-law prohibitions, the *only* federal law that either the Leagues or the United States can identify that has *ever* compelled a State "to 'administer a law it ha[d] repealed'" is Section 5 of the Voting Rights Act. U.S. Br. 25 & n.8 (quoting *Riley* v. *Kennedy*, 553 U.S. 406, 427 (2008)).

That is very revealing because Section 5's preclearance requirement was an "unprecedented" and "drastic departure from basic principles of federalism." *Shelby Cty.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013). Even if the Fourteenth Amendment grants Congress authority to require a State to administer laws that it has repealed, the Commerce Clause most certainly does not. "[E]ven where Congress has the authority under the Constitution to pass laws . . . prohibiting certain acts, it lacks the power directly to compel the States to . . . prohibit those acts." *New York*, 505 U.S. at 166. Congress cannot escape that fundamental, constitutional, and structural limitation on its power by having its defenders label it "preemption." If the federal law commandeers, it cannot preempt because Congress has no power to regulate States *qua* States.

That leaves the Leagues and the United States to argue that PASPA does not require New Jersey to do anything, including maintaining its prohibitions on sports wagering, because it might somehow permit New Jersey to enact an unspecified "variety" of *different* repeals, U.S. Br. 28, or even to "fully repeal" all of its sports wagering prohibitions, Leagues Br. 37. That is an absurd construction of a statute that, even now, the Leagues say prohibits States from "expan[ding]" sports wagering. *Id.* at 41. But the Leagues and the United States nonetheless insist that New Jersey's

only possible options are to leave its prohibitions on sports wagering at casinos and racetracks in place or "fully repeal" them (including, presumably, restrictions on children and gambling in public buildings)—a "choice" that "amounts in reality to coercion." *Petersburg Cellular P'ship* v. *Bd. of Supervisors of Nottoway Cty.*, 205 F.3d 688, 703 (4th Cir. 2000) (citing *New York*, 505 U.S. at 162). And because Congress lacks the power to compel New Jersey either to maintain its prohibitions or to "fully repeal" them, it "lacks the power to offer the States a choice between the two." *New York*, 505 U.S. at 176.

PASPA's prohibition on state "authoriz[ation] by law" impermissibly commandeers state regulatory authority by dictating the content of state law—States may not legalize sports wagering. Because this constraint on state legalization is central to the statutory scheme, the entire statute should fall, because Congress would not have otherwise enacted PASPA. Without this central provision, PASPA would allow States to legalize sports wagering but prohibit them from regulating it, opening the floodgates to a multi-billion dollar expansion of uncontrolled and underground sports wagering. The Congress that enacted PASPA cannot have wanted that irrational result; to the contrary, the text of PASPA's exceptions makes clear that Congress wanted sports wagering, wherever it might be permitted, to be *regulated* by *States*.

I. PASPA's Prohibition Of The 2014 Repeal Violates The Anti-Commandeering Principle.

A. Commandeering Is Not A Permissible Form Of Federal Preemption.

The Leagues argue that the 2014 Repeal is preempted under a "straightforward application of the Supremacy Clause." Leagues Br. 1. Yet the Supremacy Clause upholds only those laws "made in Pursuance" of the Constitution. Art. VI, cl. 2. However broad congressional power may be under the Commerce Clause, it is subject to the Tenth Amendment, which establishes that federal laws that commandeer state regulatory authority are not valid exercises of that power. The Leagues' categorical argument that federal laws phrased as Commerce Clause prohibitions never commandeer is refuted by this Court's anti-commandeering cases and the rationales underlying them. Indeed, PASPA's prohibition on State regulatory activity—licensing and authorization by law—cannot preempt because no comprehensive federal regulatory scheme governs sports wagering. PASPA simply directs States to exercise their police power to enact, maintain, and enforce federal prohibitions on private activity. Congress is not allowed to do that.

1. Commandeering state governmental machinery is not a valid means of preemption because "the Constitution simply does not give Congress the authority to require the States to regulate" their citizens. *New York*, 505 U.S. at 178.

The Court confirmed this principle in *Printz*. There, the dissenting opinion argued that the

Supremacy Clause required state officials to comply with Congress's directive to administer a federal gun law. 521 U.S. at 924. But this Court recognized that the Supremacy Clause "makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution],' Art. VI, cl. 2." *Ibid.* (alteration in original). Accordingly, "the Supremacy Clause merely brings us back to the question . . . whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution." *Id.* at 924–25. And the Court had previously "answered" that question in *New York*: "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Printz*, 521 U.S. at 924 (quoting *New York*, 505 U.S. at 166).

2. The Leagues and the United States attempt to confine the anti-commandeering principle to federal laws that affirmatively command States by telling them "what they *must do*," rather than "what they *must not do*." Leagues Br. 19; *see also* U.S. Br. 10. This, the United States asserts, is "the fundamental distinction between commandeering and preemption." U.S. Br. 10.

That formulation, which seeks to limit *New York* and *Printz* to their particular facts, badly misapprehends "the allocation of power contained in the Commerce Clause." *New York*, 505 U.S. at 166. That "allocation" "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce," *ibid.*, "[n]o matter how powerful the federal interest involved," *id.* at 178. Nor

can Congress "pre-empt contrary state regulation" without regulating the area "directly." *Ibid.* In the absence of direct federal regulation of the field, "state regulation" would not be "contrary" to federal law.

The "fundamental distinction between commandeering and preemption" is thus not whether Congress couches its legislation as a command "to do" or a prohibition "not to do," but instead whether the legislation regulates citizens "directly" or conscripts States to exercise *their own sovereign power* to regulate citizens "according to Congress' instructions." *New York*, 505 U.S. at 162. This conclusion follows from the "structure of the Constitution," *Printz*, 521 U.S. at 918, particularly the thoughtfully debated and carefully wrought decision "to substitute a national government acting . . . *directly on citizens*, instead of the Confederate government, *which acted only upon States*," *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (emphases added); *see also Maryland* v. *EPA*, 530 F.2d 215, 225 (4th Cir. 1975), *vacated on other grounds by EPA* v. *Brown*, 431 U.S. 99 (1977) (Philadelphia Convention rejected proposals that "would have enabled Congress to 'revise,' 'negative,' or 'annul' the laws of a state").

a. The command/prohibition distinction proffered by the Leagues and the United States is refuted by this Court's decisions. This Court has applied the anti-commandeering principle to invalidate federal laws that merely *prohibit* state action, *Coyle* v. *Smith*, 221 U.S. 559 (1911), while approving federal laws that *command* State action or State forbearance, *Reno* v. *Condon*, 528 U.S. 141, 150–51 (2000).

In *Coyle*, this Court held that Congress violated the Constitution by prohibiting Oklahoma from moving its capital for seven years as a condition for its admission to the Union. 221 U.S. at 563–64. The United States ignores *Coyle* entirely, and the Leagues dismiss it in a footnote as pertaining only to the "equal footing doctrine, not the anti-commandeering doctrine." Leagues Br. 27 n.4. But when the Court in *New York* held that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," it cited *Coyle* alone for the proposition. 505 U.S. at 162 (citing *Coyle*, 221 U.S. at 565).

This Court's understanding of *Coyle* is correct. *Coyle* held that the equal-footing doctrine prohibited Congress from depriving newly admitted States of powers that the existing States possessed. The Court also concluded that Congress lacked authority to direct one of the original thirteen States in the "essentially and peculiarly state power" of "locating its own seat of government" and "determining when and how it shall be changed from one place to another." *Coyle*, 221 U.S. at 565; *see also ibid.* ("That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained."). That the Constitution forbids Congress's usurpation of the original States' sovereign powers through a federal prohibition is thus an indispensable aspect of the Court's holding in *Coyle* that Oklahoma was entitled to that same constitutional protection under the equal footing doctrine.

Reno likewise rejects the command/prohibition distinction. In *Reno*, the challenged federal law "*re-*

quire[d] disclosure of personal information" in specified circumstances, and the Court "agree[d]" that compliance with the federal law would "require time and effort on the part of state employees." 528 U.S. at 145, 150. The Court nevertheless rejected the commandeering challenge because the law did "not require the States . . . to regulate their own citizens," but instead regulated the States in their non-sovereign roles as "the owners of data bases" and "participa[nts] in the interstate market for personal information." *Id.* at 150 n.3, 151. *Reno* thus shows not that the anti-commandeering principle is "narrower . . . than the prohibition/command dichotomy suggests," Leagues Br. 26, but that it tracks the "allocation of power contained in the Commerce Clause" that allows Congress to "regulate interstate commerce directly" but not to "regulate state governments' regulation of interstate commerce," *New York*, 505 U.S. at 166.

b. The "prohibition/command dichotomy" also immediately collapses in application. Just as a prohibition against exhaling is a requirement to hold your breath, and a prohibition against sleeping is a command to stay awake, a prohibition against repealing a law is an unconstitutional requirement "to . . . maintain" that law. U.S. Br. 10; *see also Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) ("preventing [a] state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated").

The Court recognized as much in *South Carolina* v. *Baker*, 485 U.S. 505 (1988), where it accepted as the predicate for its Tenth Amendment analysis the fed-

eral government's concession that Congress's withdrawal of a tax exemption on bearer bonds operated as a "blanket prohibition . . . on the issuance of bearer bonds" that, in turn, "effectively require[d] States to issue bonds in registered form." *Id.* at 511. If the "prohibition/command dichotomy" were the key to the anti-commandeering principle, the Court would not have used the "prohibition" and "require[ment]" descriptors interchangeably because their difference would have been constitutionally dispositive. Instead, the Court rejected the commandeering challenge because the federal scheme was a "generally applicable federal regulation[]" of commerce that did not "seek to control or influence the manner in which States regulate private parties." *Id.* at 514.

c. The anti-commandeering principle ensures that each level of government is responsive to its respective constituents, that state and federal officials are accountable for their own policy decisions, and that power remains diffused across state and federal sovereigns. N.J. Br. 27–30. PASPA's prohibition on state lawmaking with respect to sports wagering violates each of these principles, while the command/prohibition dichotomy proffered by the Leagues and the United States is divorced from them.

Neither the Leagues nor the United States disputes that the concerns of responsiveness, accountability, and diffusion of power are fully implicated by a federal law that prohibits a State from repealing its own laws. And, the problems here are magnified by the injunction, which requires the State's Executive to maintain "in effect" repealed state-law prohibitions that he cannot effectively execute or enforce. The Leagues cavalierly dismiss these concerns, suggesting

that state officials confronted by disgruntled constituents "have an easy answer . . . : Call your [U.S.] Senator." Leagues Br. 53. The Leagues' suggestion that New Jersey constituents call *federal* officials regarding *New Jersey* laws starkly illustrates the extent of PASPA's takeover of the States' lawmaking function. Of course, if the blame-shifting suggested by the Leagues were sufficient, accountability concerns would have played no role in *New York* or *Printz*. But they did: This Court recognized that because Congress put state officials ("not some federal official") on the front lines of defending the federal policies, it would be the state officials who would "tak[e] the blame" for the federal policy's "burdensomeness and for its defects." *Printz*, 521 U.S. at 930. And so it is here, where the State's Executive must "stand[] between" New Jersey citizens and the sports wagering activity addressed in the 2014 Repeal. *Ibid.*

* * *

The Constitution's "allocation of power" among the federal government and the States is defined not by reference to the phraseology of Congress's regulations or the labels its lawyers subsequently invent to characterize its actions, but by the regulations' object and effect. *New York*, 505 U.S. at 166. If Congress wants to regulate sports wagering, it may and must do so itself; Congress cannot compel States to regulate "as its agents." *Id.* at 178.

3. The Leagues and the United States rely on several examples of express preemption provisions to argue that prohibitions on state regulation are commonplace. *See* Leagues Br. 34–35 & n.6; U.S. Br. 13 & nn.2–3. But in each cited instance, Congress directly

regulated the field of commerce and, to advance its direct regulation, preempted state laws that contravened or impeded its efforts. PASPA, as the United States acknowledges, "*did not adopt comprehensive regulations on sports gambling*." U.S. Br. 15 (emphasis added); *see also* Leagues Pet. Opp. at 33–34 (Congress chose "to assist states in their efforts to prevent sports and other gambling, rather than to *preempt the field entirely*") (emphasis added).[1]

Rather than regulating sports gambling directly, PASPA "nullifl[ies] state laws authorizing private sports gambling schemes." U.S. Br. 15. The United States defends the naked prohibitions on state licensing and authorization by law on the ground that they "enforce" the "same federal policy" of nullifying state laws authorizing private sports wagering. *Id.* at 16. That is obviously tautological—preemption effectuates a federal policy of preemption—yet the even more critical point is that PASPA does not establish *any* "federal policy" that directly regulates *individuals*. The provision that addresses individual conduct, Section 3702(2), targets only private conduct "pursuant to" state law and thus applies *if and only if* there are state laws governing sports wagering. By regulating individuals' participation in commerce only when a State seeks to regulate that commerce, Congress is attempting to regulate indirectly what *New York* says it

[1] The Leagues characterize the FDA regulations at issue in *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604 (2011), as preempting "any state law authorizing" "third-party conduct" that "conflicts with federal policy." Leagues Br. 35. In fact, what *PLIVA* held preempted were state laws that "*required*" a drug label different from that mandated by federal law. 564 U.S. at 611–12 (emphasis added).

may not regulate directly—state governments' regulation of interstate commerce. 505 U.S. at 166. The United States acknowledges as much when it says that Section 3702(2) is designed to "nullify state laws authorizing private sports-gambling schemes." U.S. Br. 15.

B. PASPA Impermissibly Requires New Jersey To Maintain Prohibitions On Sports Wagering.

The United States explicitly concedes that PASPA "would violate the Tenth Amendment if it commanded the States to . . . maintain prohibitions on sports gambling," U.S. Br. 8, but somehow pretends away the injunction that indisputably requires New Jersey to do exactly that. The Leagues and the United States claim that PASPA "does not require states to . . . *do* anything," Leagues Br. 20, because they are "free to repeal [their] sports-wagering laws altogether," U.S. Br. 9. That construction of PASPA is facially absurd and inconsistent with the Leagues' and the United States' argument that the more limited 2014 Repeal violates PASPA. Moreover, even if PASPA allowed the alternative of unregulated, unlimited sports wagering, that "option" is so manifestly and blatantly coercive that it would leave States with no choice at all.

1. Because PASPA was enacted to stop the spread of sports wagering, it cannot reasonably be construed to offer States an option of fully repealing all of their prohibitions on the activity and opening the field to a vast, uncontrolled universe of sports gambling.

The Congress that enacted PASPA disapproved of all sports wagering. S. Rep. 102-248, at 6 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553 ("Congress has previously recognized on several occasions that gambling has no place in sports, professional or amateur."); *id.* at 8 ("the committee firmly believes that all such sports gambling is harmful"). In enacting PASPA, Congress was concerned chiefly with State *legalization* of any sports wagering, mentioning the threat posed by "legalized" sports wagering ten separate times. N.J. Br. 44.

The Senate Report does also mention sponsorship and operation of State-run sports-themed lotteries, which presumably is why PASPA *also* prohibits States from "sponsoring" or "operating" a sports wagering scheme. But PASPA's prohibition on "authoriz[ation] by law" of sports wagering gives effect to Congress's central concern about *legalization* of sports wagering, and its desire to burden the States with the responsibility of preventing it. *See* Sen. Bill Bradley, *The Professional & Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5, 6 (1992) ("Just as legalizing drugs would lead to increased drug addiction, legalizing sports gambling would aggravate the problems associated with gambling.").

It is thus unsurprising that the legislative history nowhere suggests that PASPA gives States an "option" to repeal all of their prohibitions on sports wagering. Indeed, until New Jersey claimed that PASPA impermissibly commandeered, the Leagues had forthrightly described it as "bann[ing] sports betting in states that had not authorized such schemes in the

past." Br. of Appellees at 2, *Office of Comm'r of Baseball* v. *Markell*, 579 F.3d 293 (3d Cir. 2009) (No. 09-3297) 2009 WL 5635556. Even now, the Leagues say that PASPA prohibits any "expansion" of existing sports wagering schemes. Leagues Br. 41.

Continuing to improvise and evolve its construction of PASPA's prohibitions to meet the exigencies of this litigation, the United States (at 17) newly cites *County of Washington* v. *Gunther*, 452 U.S. 161 (1981), for the proposition that "authorize" requires "affirmative enabling action." *Id.* at 169; *see also* Leagues Br. 39 (citing dictionary definitions). The Leagues' and the United States' objection to the 2014 Repeal is that it "authorize[s]" sports gambling contrary to the statute, but they do not explain why a "full repeal" would not "authorize" in precisely the same way. In fact, a full repeal is *more* of an authorization-by-law than the 2014 Repeal, whether "authorize" is defined to require permission, empowerment, endorsement, or "affirmative enabling action." U.S. Br. 17–18, Leagues Br. 36–39. In both cases, the State is simply ceasing to prohibit conduct—the only difference is that a full repeal does so to a greater extent.

The United States and the Leagues contend that it is the 2014 Repeal's "selective" nature that makes it an authorization. U.S. Br. 17; Leagues Br. 2. But that defies their own examples of permissible repeals. For example, repeals on "prohibitions on sports gambling involving wagers by adults or wagers below a certain dollar threshold" are "selective," yet the United States claims that "one would not naturally say" that, in those instances, a State "had 'authorize[d] by law' sports-gambling schemes." U.S. Br. 29. The Leagues

and the United States offer no principled construction of the term "authorize by law" that permits full repeals while also prohibiting the 2014 Repeal.

2. Reading PASPA as a statute intended to give States an "option" to "fully repeal" all prohibitions on sports wagering would not save it, as that alternative is not one the federal government may impose on the States.

The Leagues (but not the United States) argue that PASPA should be viewed as a "cooperative federalism" regime—indeed, one "solicitous of state sovereignty"—that permits States to regulate in accordance with federal standards (by prohibiting sports wagering under state law) or to "yield the field to the federal government" by fully repealing all prohibitions. Leagues Br. 48–49, 51, 52. This argument fails for four independent reasons.

First, PASPA says it "shall be unlawful for" a State to "authorize by law . . . ." 28 U.S.C. § 3702(1). That is a flat prohibition; nothing in PASPA's text even remotely echoes the cooperative federalism statutes addressed in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982).

Second, the field that PASPA's putative cooperative federalism regime "encourages" States to regulate—sports wagering by individuals—is not the field that PASPA supposedly "regulates comprehensively." Leagues Br. 49. As the Leagues acknowledge, PASPA regulates "states . . . authorizing sports-gambling schemes"; it "does not directly address sports wagering by individuals." *Ibid.* This Court's cooperative federalism cases do not allow the federal government

to bootstrap regulation in one "narrow field," *ibid.*, to encourage States to regulate a much broader field that the federal government has declined to regulate.

Third, the choice the Leagues imagine "amounts in reality to coercion" to continue prohibiting sports wagering at the State's casinos and racetracks. *Petersburg Cellular*, 205 F.3d at 703. The "choice" to ban sports wagering, or allow it but leave it completely unregulated (and accept the consequences of no regulation), is not merely a "difficult one," but in fact "coerc[es] the States into assuming a regulatory role." *FERC*, 456 U.S. at 766 (alteration in original, quotations omitted). Under this Court's decisions in *New York* and *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012), that coercion is "constitutionally determinative," even if it was not in the Court's earlier decision in *FERC* itself. *FERC*, 456 U.S. at 766.

Finally, *New York* establishes that where Congress lacks authority to impose either of two regulatory requirements on the States, it also "lacks the power to offer the States a choice between the two." 505 U.S. at 176. Here, the United States concedes that Congress may not compel States to maintain their prohibitions. U.S. Br. 8, 19. And Congress has no more power to compel States to repeal them. To be sure, Congress could *displace* those prohibitions with a regulatory—or deregulatory—regime of its own. *See, e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). But because it cannot command States to enact legislation, it cannot command States to exercise their legislative power to *repeal* state laws.

C. PASPA's Impermissible Prohibition On Repealing State Laws Cannot Be Avoided.

A telling indicator of PASPA's constitutional infirmity is that both the United States and the Leagues struggle to avoid the question presented. They offer a variety of creative statutory interpretations and urge adherence to the principle that "a statute must be construed to avoid constitutional problems. . . ." U.S. Br. 19 (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); Leagues Br. 38. True enough, but that principle cannot carry the day here. The proposed path to avoid PASPA's constitutional defect—to interpret the statute's prohibition against "authoriz[ing sports wagering] by law" to permit repeals of state-law prohibitions—is not a plausible interpretation of the statute. The United States' belated effort to suggest an alternative ground to affirm the judgment below—that the 2014 Repeal is an act of licensing—similarly lacks merit.

1. This Court may not avoid a constitutional defect in a statute by adopting a construction that is "plainly contrary to the intent of Congress." U.S. Br. 19 (quoting *Edward J. DeBartolo Corp.*, 485 U.S. at 575). Congress's manifest intent in enacting PASPA was to stop the spread of sports wagering and thereby protect the integrity of sports contests. N.J. Br. 42–44. An interpretation of "authoriz[ation] by law" that allows States to repeal their prohibitions on sports wagering—while simultaneously prohibiting States from regulating it—cannot be reconciled with this evident purpose. PASPA's text tells us that where sports wagering was to be legalized, Congress wanted it to take

place only "pursuant to a comprehensive system of State regulation." 28 U.S.C. § 3704(a)(3)(B).[2]

2. The United States briefly suggests, as an "alternative ground for affirmance," that the 2014 Repeal unlawfully "license[s]" sports wagering schemes. U.S. Br. 34. Yet, the United States saw no need to intervene in this action and as an *amicus*, it cannot advance arguments that are neither pressed by the parties nor passed upon below. *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 n.4 (2013). And the Leagues' passing mention of the argument, Leagues Br. 43 n.10, "does not develop it," so this Court should "not consider" it, *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27 n.5 (2010).

The argument falters in any event because PASPA prohibits licensing only of a sports "wagering scheme," 28 U.S.C. § 3702(1), and unlike New Jersey's 2012 Law, the 2014 Repeal does not provide for the issuance of licenses of any kind, much less licenses to conduct sports wagering schemes, N.J. Br. 8, 10–12. The United States theorizes that because New Jersey, under *other* statutes, issues licenses to casino and race-

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[2] The Leagues claim that as long as Section 3702(2)'s prohibitions on private conduct stands, New Jersey's challenge to Section 3702(1) "would have little practical effect." Leagues Br. 54. But if "authorization by law" were construed to permit the 2014 Repeal, then sports wagering at New Jersey casinos and racetracks would result from the *absence* of state-law prohibitions, and thus would not be "pursuant to [] law" within the meaning of Section 3702(2) and the definition of "authoriz[ation]" now being advanced. The United States effectively concedes as much by acknowledging that sports wagering "left unregulated" is not conducted "pursuant to" law. U.S. Br. 18.

track operators for activities other than sports wagering, the repeal of prohibitions on sports wagering at those locations "'license[d]' those facilities to conduct sports-gambling schemes." U.S. Br. 34 (alteration in original). But merely lifting prohibitions on an activity is not the same as the State licensing the activity. To the contrary, because the prohibition has been lifted, no license for the activity is needed; people are *free* to engage in the activity. That, after all, is why the Leagues and the United States say a full repeal is not an "authorization by law."[3]

Indeed, if this "licensing" theory had any validity—and it does not—the logical remedy would be to command the State to cancel the offending licenses. That neither the Leagues nor the United States has ever sought that relief amply demonstrates that their interest lies not in preventing licensing of sports wagering (indeed, no such licensing exists in New Jersey), but its legalization.

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[3] The Leagues' licensing theory, however, exposes the "full repeal" option as a sham. After touting that "New Jersey is free to repeal its prohibitions on sports gambling," (by which they mean only a "full[] repeal," Leagues Br. 37), the Leagues say that, even then, New Jersey could not permit "license[d] casinos" to "offer sports-gambling schemes." *Id.* at 46 n.11. That can be true only if the *full repeal* is an impermissible "licens[ing]" of sports gambling schemes. U.S. Br. 34. But given that virtually every business in New Jersey is operated by someone who holds a license, that would leave New Jersey citizens few places to enjoy their new freedom to engage in sports wagering. The Leagues cannot argue that PASPA permits States to legalize sports wagering and simultaneously say that PASPA prohibits States from allowing sports wagering in places that hold licenses for other activities.

II. "AUTHORIZE BY LAW" CANNOT BE SEVERED FROM THE REMAINDER OF THE STATUTE.

The federal prohibition on state legalization of sports wagering is the centerpiece of PASPA, and once it is struck down as unconstitutional, the rest of the statute cannot function as Congress intended. The challenged provision therefore is not severable.

A. Severability turns on whether, after the unconstitutional provision has been excised, the remaining portions of the statute would be "fully operative as a law" and function "in a manner consistent with the intent of Congress." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684–85 (1987) (quotations omitted). Of course, when the Court finds "a constitutional flaw in a statute," it "tr[ies] to limit the solution to the problem." *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 508 (2010) (quotations omitted). But the inquiry is one of "legislative intent," *United States* v. *Booker*, 543 U.S. 220, 246 (2005), focusing on what Congress intended to accomplish and whether the remaining portions of the statute would advance that purpose, *NFIB*, 567 U.S. at 578. If it is "evident" that Congress "would not have enacted" the remaining provisions without the invalid one, *New York*, 505 U.S. at 186 (quotations omitted), or that the statutory leftovers would frustrate Congress's purpose, the Court cannot legislate the leftovers into law. *See, e.g.*, *Booker*, 543 U.S. at 258; *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 193–95 (1999).

B. Excising the prohibition on state legalization of sports wagering and permitting the rest of PASPA to remain would not be "consistent with Congress' basic objectives in enacting the statute," *Booker*, 543

U.S. at 259, namely, to prevent States from legalizing sports wagering. N.J. Br. 5–7; S. Rep. 102-248, at 3–8.

The prohibition on State legalization is at the heart of PASPA, and the enacting Congress would not have wanted to retain a remainder that would allow States to legalize sports wagering, but then prohibit States from supervising it to ensure that it is responsibly conducted. The Congress that wanted to force States to ban sports wagering entirely would not have wanted that result. Amicus Br. (Merits) of Am. Gaming Ass'n at 16–18 (explaining benefits flowing from State regulation of sports wagering). PASPA's text proves the point: In the provision designed to permit the possibility of sports wagering in Atlantic City, Congress specified that the wagering could occur only "pursuant to a comprehensive system of State regulation." 28 U.S.C. § 3704(a)(3)(B). And the regime permitted in Nevada was similarly a fully regulated one. S. Rep. 102-248, at 8, 10, 12. Accordingly, Section 3702(1)'s ban on licensing must fall with the ban on state legalization. *See* N.J. Br. 54–55.

Further, Congress would not have enacted Section 3702(2) without Section 3702(1)'s ban on state licensing and authorization by law. The two sections are textually linked: Section 3702(1) prohibits sports wagering from being "authorize[d] by law," and Section 3702(2) refers back to that "law." And the United States acknowledges that Section 3702(2)'s purpose is to "nullify" state laws prohibited by Section 3702(1). U.S. Br. 15. If Section 3702(2) is a "belt" to Section 3702(1)'s "suspenders," Leagues Br. 56, then the trousers are Congress's unconstitutional "federal policy" of prohibiting States from legalizing sports wagering under their own laws. Because the two parts of Section

3702 are "mutually dependent upon one another," they stand or fall together. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936).

Moreover, if Section 3702(2) stood independently, it would make "unlawful" under federal law *only* conduct that is *lawful* under state law. That is a very dubious construction of Congress's intent because the broader corpus of federal laws regulating wagering (including sports wagering in particular) generally makes conduct unlawful only to the extent it is unlawful in the State in which it occurs. *See, e.g.*, 18 U.S.C. § 1084 (criminalizing transmission of wagering information only where it is not lawful as a matter of state law). The severance the Leagues and the United States propose would reverse this practice without any indication that Congress intended that result.[4]

C. The Leagues (at 54–59) and the United States (at 31–35) argue that even if PASPA's other prohibitions fall, its provisions prohibiting States from sponsoring or operating sports wagering schemes should survive. But if Congress could not achieve its primary

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[4] Contrary to the Leagues' suggestion, the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361 *et seq.*, does not prohibit "as a matter of federal law" sports wagering that is "lawful under state law." Leagues Br. 5–6. The UIGEA does not prohibit sports wagering at all; it prohibits *money transfers* arising from "unlawful internet gambling." 31 U.S.C. § 5363. And only wagers that are "unlawful under any applicable Federal or State law" fall into that category. *Id.*, § 5362(10)(A). There is no federal law that directly prohibits sports wagering of the type allowed by the 2014 Repeal unless it is independently unlawful under state law. That, of course, is why the Leagues invoked PASPA to enjoin New Jersey's 2014 Repeal—to keep sports wagering "unlawful" in New Jersey.

goal of stopping States from legalizing sports wagering, it is unlikely Congress would have wanted to take away States' ability to operate wagering schemes themselves, which may be a State's surest means of ensuring that they are operated responsibly and safely.

* * *

A Congress interested in stopping the spread of legalized sports wagering "would not have enacted" a statute that would permit completely unregulated sports wagering while outlawing closely regulated sports wagering. *New York*, 505 U.S. at 186. Nor would that Congress have enacted a law selectively penalizing third parties in States where sports wagering is legal, while leaving unaffected those where sports wagering is either illegal or decriminalized. Section 3702 therefore must be struck down in its entirety.

CONCLUSION

Because PASPA unconstitutionally commandeers the States and because its unconstitutional provisions are not severable, the Court should reverse the Third Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, [et al.], *Plaintiffs*, v. CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, [et al.], *Defendants*. * * * * * * February 14, 2013	[No.]: 3:12-CV-04947-MAS-LHG [Transcript of Hearing, Dist. Ct. Dkt. 145]

* * *

[106] THE COURT: Please be seated, folks. I had an opportunity to take a quick look at my notes here. I only have one follow-up question, and it's really for the plaintiffs and the Department of Justice. And that is whether or not -- I want to make sure that we're clear as to whether or not you're contending that there is any kind of regulatory scheme in place as a result of either the criminal laws and PASPA combined or the like. I need to just kind of make sure I'm clear on that whole issue if you are asserting that. You may not be at all.

MR. FISHMAN: I think it's my view, Judge, that there is no regulatory scheme in place in New Jersey because of PASPA, okay. New Jersey has a regulatory scheme in place that is comprised, as I understand it - I'm a federal prosecutor, not a state prosecutor - of criminal laws and civil sanctions that determine what people can and can't do. Those laws have morphed over time as the state legislature has seen fit to [107] amend them.

We're not, by the way, as Mr. Griffinger said, contending that the legislature is frozen in time in 1992. The legislative history and the rational-basis question that you asked, is frozen in time in 1992. But the legislature can continue to tinker with state gambling laws. And it has a regulatory scheme, but it's not a regulatory scheme because of PASPA. It has a regulatory scheme because it is good, sound state government to have a regulatory scheme that involves gambling. Because, as Mr. Olson points out, having people running a muck, gambling illegally is not a healthy

thing. And the Department of Justice certainly doesn't want that either.

THE COURT: But to the extent that we're talking about any kind of Supremacy Clause analysis for preemption purposes, are you contending that there is any kind of regulatory scheme in place?

MR. FISHMAN: No. If I might clarify, I don't think anybody is arguing the actual Doctrine of Preemption because there is a whole law of preemption out there that Mr. Olson is probably way more familiar with than I am, and there are different kinds of preemption. We are simply arguing there is a Supremacy Clause issue here. Congress has said, you can't do this, and all the states must follow that command. I will say that, no, there is a regulatory regime that New Jersey has [108] in place, not because of PASPA. It can enforce that regulatory regime to the extent that it deems it is appropriate to do that or not given what other resource constraints it has. And PASPA does not compel them to do more or to do less in that regard.